IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA WESTERN DIVISION



JOHN LINEK, INC.,	CLERK U.S. DISTRICT COURT SOUTHERN DISTRICT OF IOWA Civil No. 1:00-cv-30010
Plaintiff,) }
vs.)) ·
SYSTEM TRANSPORT, INC., and KELLY D. BUECHNER,	INSTRUCTIONS TO THE JURY
Defendants.	
KELLY D. BUECHNER and KIM BUECHNER and SYSTEM TRANSPORT, INC.,	
Counterclaimants,	
vs.	
JOHN LINEK, INC.,	
Counterdefendant.))

MEMBERS OF THE JURY, THE COURT NOW GIVES YOU THE FOLLOWING INSTRUCTIONS:

This case involves an accident that occurred on Interstate 80 near Atlantic, Iowa, on July 24, 1999. A truck owned by plaintiff, John Linek, Inc., and driven by Roman Szostka, was eastbound. The truck was moving slowly, partially in the right hand lane and partially on the shoulder. A truck owned by defendant System Transport, Inc., and driven by defendant Kelly Buechner was also eastbound. The System Transport/Buechner truck did not avoid the Linek truck, and struck the left rear of the Linek trailer with the right side of the System Transport truck as defendant Buechner attempted to move into the left hand lane.

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As a result of the accident, both vehicles sustained damage and cargo losses and Kelly Buechner was injured. John Linek, Inc. filed suit against System Transport, Inc. and Kelly Buechner seeking compensation for its damages. Linek alleges Buechner operated the System truck negligently, resulting in property losses to John Linek, Inc.

Kelly Buechner denies that he was negligent and denies responsibility for plaintiff's damages. Buechner has filed a counterclaim against John Linek, Inc., alleging that Linek's driver operated the Linek truck negligently. Buechner's wife Kim Buechner, joined this action alleging damages for loss of consortium from Buechner's injuries.

System Transport denies that Buechner was negligent and denies any responsibility for plaintiff's damages, and has filed a counterclaim for its losses. John Linek, Inc. denies that its truck was operated negligently.

In these instructions when I refer to John Linek I mean the corporation John Linek, Inc., and when I refer to System Transport I mean the corporation System Transport, Inc.

Do not consider this summary as proof of any claim. Decide the facts from the evidence and apply the law which I will now give you.

Members of the jury, the instructions I gave at the beginning of the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of the trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed. In considering the instructions, you will attach no importance or significance whatever to the order in which they are given.

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

You must follow the instructions now given you regardless of your opinion of what the law ought to be. You need not be concerned with the wisdom of any rule of law.

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Finally, as judges of the facts your duty is to decide all fact questions. In doing so, do not be influenced by any personal likes or dislikes, sympathy, bias, prejudice or emotions.

You shall base your verdict only upon the evidence and these instructions.

Evidence is:

- 1. Testimony in person or by deposition;
- 2. Exhibits received by the Court.
- 3. Stipulations which are agreements between the parties. If the parties stipulate to a fact, you should treat that fact as having been proved.

Evidence may be direct or circumstantial. The weight to be given any evidence is for you to decide.

Sometimes, during a trial, references are made to pretrial statements and reports, witnesses' depositions, or other miscellaneous items. Only those things formally offered and received by the court are available to you during your deliberations. Documents or items read from or referred to which were not offered and received into evidence, are not available to you.

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The following are not evidence.

- 1. Statements, arguments, questions and comments by the lawyers.
 - 2. Objections and rulings on objections.
 - 3. Testimony I told you to disregard.
- 4. Anything you saw or heard about this case outside the courtroom.

You will decide the facts from the evidence. Consider the evidence using your observations, common sense and experience. You must try to reconcile any conflicts in the evidence, but if you cannot, you will accept the evidence you find more believable.

In determining the facts, you may have to decide what testimony you believe. You may believe all, part, or none of any witness' testimony.

There are many factors which you may consider in deciding what testimony to believe, for example:

- Whether the testimony is reasonable and consistent with other evidence you believe;
- 2. The witness' appearance, conduct, age, intelligence, memory, and knowledge of the facts;
- 3. The witness' interest in the trial, their motive, candor, bias, and prejudice; and
- 4. Whether the witness said something different at an earlier time.

Certain testimony has been received into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing or on videotape. Consider that testimony as if it had been given in court.

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You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.

Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

An expert witness was asked to assume certain facts were true and to give an opinion based on that assumption. This is called a hypothetical question. If any fact assumed in the question has not been proved by the evidence, you should decide if that omission affects the value of the opinion.

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In these instructions you are told that your verdict depends on whether you find certain facts have been proved.

The burden of proving a fact is upon the party whose claim depends upon that fact. The party who has the burden of proving a fact must prove it by the greater weight or preponderance of the evidence. To prove something by the greater weight or preponderance of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable.

The greater weight or preponderance of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

In this case the plaintiff John Linek and defendant System Transport are corporations and Kelly and Kim Buechner are individuals. Each party has equal rights in court. This case should be determined by you with the same fairness and consideration as though it were a case between individuals, and no inference or presumption is to be drawn against the corporations that would be improper in a case between individuals. All parties in this case are entitled to equal justice in your hands and to a fair and impartial consideration of the entire case.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law, and are to be dealt with as equals in a court of law.

In these instructions, I will be using the term "fault." Fault means one or more acts or omissions towards the person of another which constitutes negligence.

"Negligence" means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. Negligence is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

The mere fact an accident occurred or a party was injured does not mean a party was negligent.

The conduct of a party is a proximate cause of damage when it is a substantial factor in producing damage, and when the damage would not have happened except for the conduct.

"Substantial" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

A corporation is liable for the wrongful acts of its employees if the acts are done in the scope of employment. In this case, it is undisputed that both Roman Szostka and Kelly Buechner were in the course of employment at the time of the collision which is the subject of this case. Also, in all cases where damage is done by a motor vehicle by reason of the negligence of a driver and driven with the consent of the owner, the owner of the motor vehicle shall be liable for such damage. It is undisputed that Roman Szostka and Kelly Buechner were driving tractor trailers owned, respectively, by John Linek and System Transport with the consent of the owner. Therefore, John Linek is responsible for any negligent acts of Roman Szostka and System Transport is responsible for any negligent acts of Kelly Buechner. In this case you will be asked to compare the fault, if any, of the two drivers and your findings will be used to determine the liability of John Linek and System Transport for damages claimed against them.

Plaintiff John Linek claims defendants System Transport and Kelly Buechner were at fault due to the negligence of defendant Kelly Buechner. "Negligence" has been explained in another instruction.

Linek must prove all of the following propositions:

- 1. Kelly Buechner was negligent in one or more of the following ways:
 - a. In driving his vehicle at a speed greater than permitted him to stop within the assured clear distance ahead;
 - b. In failing to have his vehicle under control; or
 - c. In failing to keep a proper lookout.
- 2. Kelly Buechner's fault was a proximate cause of the damage to John Linek's tractor trailer and cargo.

If John Linek has failed to prove either proposition, Linek is not entitled to damages. If John Linek has proved all of these propositions, you will assign a percentage of fault against Kelly Buechner and include his fault in the total percentage of fault found by you when answering the special verdicts.

System Transport, Kelly Buechner, defendants and counterclaimants, and Kim Buechner, counterclaimant, claim that John Linek, Inc., was at fault due the negligence of Roman Szostka. "Negligence" has been explained to you in another instruction.

System Transport and the Buechners must prove all of the following propositions:

- 1. That Roman Szostka was negligent in one or more of the following ways:
 - a. In operating his vehicle when it was not reasonably safe for him to do so because of the length of time he had been driving;
 - b. In failing to keep a proper lookout;
 - c. In operating his truck on an interstate highway below the posted minimum speed of 40 m.p.h.
- 2. Roman Szostka's fault was a proximate cause of counterclaimants' damages.
- 3. The amount of damages to Kelly Buechner and Kim Buechner.

If System Transport and the Buechners have failed to prove any of these propositions, they are not entitled to damages. If System Transport and the Buechners have proved all of these propositions, you will assign a percentage of fault against Roman Szostka and include his fault in the total percentage of fault found by you when answering the special verdicts.

In determining and assessing the fault of the drivers under paragraph 1 of Instruction Nos. 13414, you shall consider the following motor vehicle rules of the road and regulations.

- a. No person shall drive any vehicle on a highway at a speed greater than will permit them to stop within the assured clear distance ahead. The words "within the assured clear distance ahead" mean the distance from which noticeable objects, reasonably expected or anticipated to be upon the highway, may be seen. A violation of this law is negligence.
- b. A driver must have his or her vehicle under control. It is under control when the driver can guide and direct its movement, control its speed and stop it reasonably fast. A violation of this duty is negligence.
- c. "Proper lookout" is the lookout a reasonable person would keep in the same or similar situation. It means more than looking and seeing. It includes being aware of the operation of the driver's vehicle in relation to what the driver saw or should have seen. A driver need not keep a lookout to the rear all the time, but must be aware of the presence of others when the driver's actions may be dangerous to others. A violation of this duty is negligence.

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- d. At the time and place in question the speed of any vehicle less than 40 miles per hour was unlawful, unless a lesser speed was reasonable and proper in light of traffic and road conditions. A violation of this law is negligence.
- e. You have heard evidence that federal motor vehicle regulations limited the number of hours a truck driver could drive within a prescribed period. The failure of a truck driver to comply with these regulations is evidence of negligence. Such evidence is relevant and you should consider it, but it is not conclusive proof.

Damages may be the fault of more than one person. In comparing fault, you should consider all of the surrounding circumstances as shown by the evidence, together with the conduct of Roman Szostka and Kelly Buechner, and the extent of the causal relation between their conduct and the damages claimed. You should then determine what percentage, if any, each person's fault contributed to the damages.

After you have compared the conduct of Roman Szostka and Kelly Buechner, if you find Roman Szostka was at fault and his fault was more than 50% of the total fault, John Linek cannot recover damages.

However, if you find Roman Szostka's fault was 50% or less of the total fault, then I will reduce John Linek's total damages by the percentage of Szostka's fault.

After you have compared the conduct of Roman Szostka and Kelly Buechner, if you find Kelly Buechner was at fault, and his fault was more than 50% of the total fault, System Transport, Kelly Buechner and Kim Buechner cannot recover damages.

However, if you find Kelly Buechner's fault was 50% or less of the total fault, then I will reduce the total damages of System Transport, Kelly Buechner and Kim Buechner by the percentage of his fault.

The parties have agreed to the amount of damages caused to John Linek and System Transport by the accident. Accordingly, the verdict form does not ask you to determine the amount of damages to either of these parties. The Court will determine what amount, if any, John Linek and System Transport should receive based on your answers to the questions in the special verdict form.

If you find Kelly Buechner is entitled to recover damages, you shall consider the following items:

- 1. The reasonable value of necessary hospital charges, doctor charges, prescriptions and other medical services from the date of injury to the present time. The parties have stipulated this amount is \$478,195.71.
- 2. The reasonable value of lost wages from the date of injury to the present time.
- 3. The present value of loss of future earning capacity. Loss of future earning capacity is the reduction in the ability to work and earn money generally, rather than in a particular job.
- 4. Loss of function of the body from the date of injury to the present time. Loss of function of the body is the inability of a particular part of the body to function in a normal manner.
- 5. The present value of future loss of function of the body.

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- 6. Physical and mental pain and suffering from the date of injury to the present time. Physical pain and suffering may include, but is not limited to, bodily suffering or discomfort. Mental pain and suffering may include, but is not limited to, mental anguish or loss of enjoyment of life. If you find Kelly Buechner is entitled to recover damages, you must award some amount for past pain and suffering.
- 7. The present value of future physical and mental pain and suffering.

The amount you assess for physical and mental pain and suffering in the past and future, future earning capacity, loss of function of the body in the past and future cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by a party as proved by the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damages to be included in any amount awarded under another amount of damage. Similarly, damages awarded to one party shall not be included in any amount awarded to another party.

The amounts, if any, you find for each of the above items will be used to answer the special verdicts.

Kim Buechner seeks damages for loss of the spousal consortium of her husband Kelly Buechner. "Spousal consortium" is the fellowship of husband and wife and the right of each to the benefits of services, company, cooperation, affection, the aid of the other in every marital relationship, general usefulness, industry and attention within the home and family. It does not include loss of financial support from the injured spouse, nor mental anguish caused by the spouse's injury.

If you find Kim Buechner is entitled to recover spousal consortium damages, it is your duty to determine the amount. In doing so, you shall consider the following items:

- 1. The reasonable value of loss of spousal consortium which Kelly Buechner would have performed for Kim Buechner from the date of injury until the present time.
- 2. The reasonable value of loss of spousal consortium which Kelly Buechner would have performed in the future.

Damages for loss of future spousal consortium are limited in time to the shorter of the spouses' normal life expectancy.

The amount you assess for loss of spousal consortium, past and future, cannot be measured by an exact or mathematical standard. You must use your sound judgment based upon impartial consideration of the evidence. Your judgment must not be exercised arbitrarily or out of sympathy or prejudice for or against any

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party. The amount you assess for any item of damage must not exceed the amount caused by Roman Szostka as proved by the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amounts awarded under another item of damage. Similarly, damages awarded to one party shall not be included in any amount awarded to another party.

Add together the amounts you find, if any, for each of the above items and the total will be used to answer the special verdicts.

Future damages must be reduced to present value. "Present value" is a sum of money paid now in advance which, together with interest earned at a reasonable rate of return, will compensate the party for future losses.

A Standard Mortality Table indicates the normal life expectancy of people who are the same ages as Kelly Buechner and Kim Buechner are 34.05 and 43.91 years, respectively. The statistics from a Standard Mortality Table are not conclusive. You may use this information, together with all the other evidence, about Kelly Buechner's health, habits, occupation and lifestyle, when deciding issues of future damages.

Your first duty upon retiring to the jury room for your deliberations is to elect one of your members foreperson of the jury. The person so elected is responsible for the orderly, proper and free discussion of the issues by any juror who wishes to express his or her views. The foreperson will supervise the balloting and sign the interrogatories that are in accord with your decision and will also sign any written inquiries addressed to the Court.

Requests regarding instructions are not encouraged. Experience teaches that questions regarding the law are normally covered in the instructions, and the jury is encouraged to examine them very carefully before making any further requests of the Court.

The attitude of jurors at the outset of their deliberations is important. It is seldom helpful for a juror, upon entering the jury room, to announce an emphatic opinion in a case or determination to stand for a certain verdict. When a juror does that at the outset, individual pride may become involved, and the juror may later hesitate to recede from an announced position even when it is incorrect. You are not partisans or advocates. You are judges--judges of the facts. Your sole interest is to ascertain the truth.

The verdict must represent the considered judgment of each juror. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. An inconclusive trial is always undesirable. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Submitted to you with these instructions is the special verdict form. After you have agreed and appropriately signed the verdict form in accordance with the directions contained therein, inform the jury officer outside the room. You will have the verdict signed only by one of your number whom you will have selected as your foreperson and return with it into court.

Dated this 11 day of November, 2001.

ROSS A. WALTERS

CHIEF UNITED STATES MAGISTRATE JUDGE